BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RADLEY A. TROWBRIDGE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,039,456
SHERWIN WILLIAMS COMPANY	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent appeals the June 24, 2008 preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded benefits in the form of medical treatment and temporary total disability compensation (TTD) after the ALJ determined that claimant had suffered an accidental injury which arose out of and in the course of his employment with respondent and that timely notice had been given.

Claimant appeared by his attorney, Alexander B. Mitchell, II, of Wichita, Kansas. Respondent, a self-insured, appeared by its attorney, Larry D. Shoaf of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Preliminary Hearing held May 8, 2008, with attachments; and the documents filed of record in this matter. The Board has also considered the records on claimant from the VA Hospital, provided pursuant to a request by the ALJ and with the agreement of the parties.

ISSUES

1. Did claimant suffer an accidental injury which arose out of and in the course of his employment with respondent? Respondent contends claimant's ongoing back problems are the result of an injury which claimant suffered while deployed with the United States Army in Iraq. Claimant acknowledges the injury suffered in Iraq, but contends he

suffered an aggravation of that preexisting condition while working for respondent.

2. Did claimant provide timely notice of this alleged accident?

3. What is the correct date of accident? Claimant has alleged a date of accident on January 3, 2008. Respondent alleges claimant went to the emergency room at the VA Hospital on December 31, 2007, with kidney pain and not due to a back injury.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant began working for respondent in September 2007 as a tank washer. Approximately one month later, claimant transferred to a job as a batch maker. This job required that claimant lift 50-pound bags, move 55-gallon barrels and move 40-pound hoses on a regular basis. On the date of accident, claimant was moving a hand pallet of 50-pound bags when he felt a pull in his back. Claimant also experienced immediate pain in his groin area. He laid down on the floor for a period of time. This incident was witnessed by a co-worker, Jarrod Westin. Claimant told Jarrod to get the supervisor, Victor. Claimant left work early and was taken to the VA Hospital emergency room by Victor.

There is a dispute regarding the appropriate date of accident. Claimant filed an E-1, Application for Hearing, which listed the date of accident as January 3, 2008. Claimant also testified about a January 3, 2008 accident when asked at the preliminary hearing. However, medical records from the VA Hospital with a date of December 31, 2007, discuss claimant's back pain and the fact that he does heavy lifting while working for respondent. A follow-up report dated January 3, 2008, from the VA Hospital notes the evaluation on December 31, 2007, with a direction that claimant was to follow up with the VA Hospital if the pain increased. The note went on to state that claimant had called that morning requesting to be seen that day. A card from the VA Hospital dated January 3, 2008, requests that claimant be excused from work for three days. A follow-up prescription form from the VA Hospital dated January 7, 2008, places a 25-pound lifting restriction on claimant and limits his weight bearing to 4 hours per day.

At the preliminary hearing, claimant testified that he was taken to the VA Hospital emergency room by Victor on January 3 and not on December 31. However, the December 31 medical record indicates that claimant arrived by private car. The medical

documents contradict claimant's memory. It appears that claimant was confused at the time of his testimony regarding the dates and number of times he has visited the VA Hospital for this back problem.

Medical records confirm that claimant has had back problems since an incident in Iraq when claimant fell down some steps while wrestling an Iranian. Claimant has also been to the VA Hospital on numerous occasions due to possible kidney problems and back pain associated with that condition. The fact that claimant may have become confused as to the different hospital visits is understandable.

Respondent argues that claimant's testimony is not credible because claimant worked a full shift beginning January 2, 2008, and ending on January 3, 2008, not leaving work until 6:30 a.m. This conflicts with claimant's testimony that he had to leave work early due to the back pain. However, the entry dated 12/30[1] indicates that claimant clocked in at 9:55 p.m. on December 30, 2007, and left at 4:04 a.m. on the morning of December 31, 2007, the first date claimant was examined at the VA Hospital emergency room. This is further indication that claimant may have simply confused the dates in this matter. Victor, who is further identified as Victor Mejia-Toscano by Nancy Dinell, respondent's human resources manager, did not testify in this matter.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[2]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[3]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

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[1] P.H. Trans., Resp. Ex. F.

[2] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[3] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[4] K.S.A. 2007 Supp. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

This record supports a finding that claimant suffered an accidental injury which arose out of and in the course of his employment with respondent. While claimant may have had preexisting back problems, it is not necessary that an injury originate at work.

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[6]

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[7]

Claimant testified that he asked a co-worker to get Victor after claimant suffered a work-related injury. Victor was the person who took claimant to the VA Hospital on the date of accident.

Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.[8]

Claimant's testimony is uncontradicted in this regard and is found to be credible.

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[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[6] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[7] K.S.A. 44-520.

[8] *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

Date of accident is not an issue that the Board has jurisdiction to decide on an appeal from a preliminary hearing order unless a finding is necessary in order to determine whether claimant suffered accidental injury arising out of and in the course of employment, or if notice and/or written claim was timely made.[9]

The Board does not usually consider date of accident as an issue on appeal from a preliminary hearing order. However, in this instance, there is a dispute regarding whether claimant suffered the injury alleged. With the conflicting testimony, it becomes necessary for a date of accident determination to verify that the accident actually occurred and did arise out of and in the course of the employee's employment. Here, the evidence confirms that claimant left work early the morning of December 31, 2007, and was taken by private car to the VA Hospital. While there, claimant was treated for low back pain and a discussion occurred between claimant and the treating physician about the heavy lifting claimant performed at work. This Board Member finds, as did the ALJ, that claimant suffered a work-related accidental injury on December 31, 2007, while working for respondent. The date of accident found by the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has satisfied his burden that he suffered an accidental injury which arose out of and in the course of his employment with respondent on December 31, 2007, and that timely notice was provided to respondent. Therefore, the decision by the ALJ granting claimant temporary benefits should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated June 24, 2008, should be, and is hereby, affirmed.

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[9] *Cluck v. Atchison Casting Corp.*, Nos. 204,983 & 265,534, 2002 WL 31602542 (Kan. WCAB Oct. 24, 2002).

[10] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of September, 2008.

HONORABLE GARY M. KORTE

c: Alexander B. Mitchell, II, Attorney for Claimant
Larry D. Shoaf, Attorney for Respondent
John D. Clark, Administrative Law Judge